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signed 5-16-02

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**QUINN DESHAWN BRALEY,
d/b/a Cellular Extreme,**

DEBTOR.

**CASE NO. 01-41933-7
CHAPTER 7**

MEMORANDUM OF DECISION

This matter is before the Court on the trustee's objection to the debtor's amended exemption claim. The debtor appears by counsel, Frank D. Taff of Topeka, Kansas. Trustee Darcy D. Williamson represents herself. The amended exemption claim is for residual payments received and to be received from Verizon Wireless LLC ("Verizon"). The debtor claims the residual payments are "earnings" covered by K.S.A. 60-2310(a)(1) as interpreted by Kansas case law. The trustee contends that the residual payments are property of the estate but are not exempt. The parties have stipulated to the controlling facts, and have submitted legal arguments. The Court is now ready to rule.

Before he filed for bankruptcy, the debtor had had a contract with Verizon ("the Contract") under which he was authorized to sell Verizon's wireless telecommunications services, but the Contract had been terminated (in March 2001, according to the debtor's Statement of Financial Affairs). Nevertheless, the debtor continued to be entitled for a time to some payments from Verizon. In a letter brief submitted to the Court, the debtor's counsel suggests the money Verizon owes the debtor is, pursuant to Paragraph 13.1 of the Contract, "commissions earned but not paid prior to termination." However, the parties' presentation to the Court at a hearing on January 31, 2002, made clear that the

money instead constituted “residual payments” under Paragraph 13.2, (although the parties did not supply the Court with a copy of Schedule 1, in which the residual payments are supposed to be “described”). As indicated at the hearing, the residual payments are owed simply because customers the debtor had signed up continued to buy Verizon’s services after the Contract was terminated.

The debtor appears to concede that the residual payments are property of his bankruptcy estate. To the extent he may be disputing this fact, the Court must disagree with him. In a case decided under the Bankruptcy Act, the Supreme Court indicated that an item qualified as “property” under that Act if it was “sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts’ ability to make an unencumbered fresh start that it should be regarded as” such. *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). As adopted in 1978, the Bankruptcy Code sought to expand the “property of the estate” to include even more items than were included under the Act. *See* 11 U.S.C.A. §541(a); H.R. Rep. No. 95-595, at 367-68 (1977); S. Rep. No. 95-989, at 82-83 (1978). Here, the debtor is entitled to the residual payments based on his customers maintaining their service contracts with Verizon for a period of twelve months after his Contract with Verizon was terminated. The postpetition residual payments are not compensation for services that the debtor has provided or will provide since he filed for bankruptcy, but are being paid only because the customers he signed up for Verizon services prepetition are still buying those services. The debtor has no remaining obligation to perform in order to be entitled to receive the payments. With the exception that he not compete with Verizon for a year after the Contract was terminated, the debtor is free to perform personal services for compensation and “make an unencumbered fresh start.” Under these circumstances, the residual payments must be regarded as meeting the *Segal* test to be property of the estate.

This leaves the question whether the debtor may exempt the residual payments under K.S.A. 2001 Supp. 60-2310. By its literal terms, this provision establishes restrictions on the garnishment of a person's "earnings." The Court believes that the restrictions exempt covered "earnings" not just from garnishments but generally from the claims of creditors to the extent provided in the statute, and that the exemption is available in bankruptcy. *See In re Urban*, 262 B.R. 865, 866-71 (Bankr.D.Kan. 2001); *In re Adcock*, 234 B.R. 815, 816-17 (Bankr.D.Kan. 1999), *rev'd on other grounds*, 264 B.R. 708 (D.Kan. 2000)¹. The statute defines "earnings" to mean "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise." K.S.A. 2001 Supp. 60-2310(a)(1). Kansas state courts have interpreted the provision to apply to compensation an employer owes to an employee, but not to apply to compensation a business owes to an independent contractor. *Coward v. Smith*, 6 Kan. App. 2d 863, 865-67 (1981). Thus, the distinction between an employee and an independent contractor lies at the heart of the parties' dispute.

Kansas courts and a state agency have, in a variety of contexts, identified a number of factors that guide the determination whether someone is an employee or an independent contractor. *See, e.g., Hartford Underwriters Ins. Co. v. Kansas Dep't of Human Resources*, ___ Kan. ___, 32 P.2d 1146, 1150-54 (2001) (whether personal care attendants were employees so that quadriplegic, not attendants, owed unemployment insurance taxes for their services); *Mitzner v. Kansas Dep't of Social and Rehabilitation Servs.*, 257 Kan. 258, 260-63 (1995) (whether licensed foster parent was state

¹In reversing, the district court held that earnings are not covered by 60-2310 once they have been deposited in a bank account. The court did not express an opinion on the question whether 60-2310 created an exemption that is available in bankruptcy.

employee so state would be vicariously liable for foster parent's tort); *Crawford v. Kansas Dep't of Human Resources*, 17 Kan. App. 2d 707, 709-713 (1989), *rev. denied* 246 Kan. 766 (1990) (whether employer must pay state unemployment tax; also listing factors considered by state department of human resources in resolving employee-or-independent-contractor question). The Tenth Circuit has noted several similar tests that have been applied in making the employee-or-independent-contractor determination under the Fair Labor Standards Act, 29 U.S.C.A. §201, *et seq.*, the Employee Retirement Income Security Act, 29 U.S.C.A. §1001, *et seq.*, and the Kansas Wage Payment Act, K.S.A. 44-313, *et seq.* *Herr v. Heiman*, 75 F.3d 1509, 1512-13 (10th Cir. 1996). Former Bankruptcy Judge (now District Judge) Robinson relied heavily on the *Crawford* analysis (as noted in *Herr*) in deciding whether a debtor was an employee or an independent contractor under Kansas law. *In re Price*, 195 B.R. 775, 777-79 (Bankr.D.Kan. 1996).

Considering the circumstances of this case in light of Kansas law distinguishing between employees and independent contractors, the Court must conclude that the debtor's relationship with Verizon was as an independent contractor, not as an employee. The following facts lead to this conclusion. The Contract called the debtor an independent contractor. The debtor was allowed to hire his own employees. He could contract with subdealers. He was to market Verizon's services diligently, but to identify Verizon as the provider of the services and not to represent his company as a licensee of those services. He was responsible for paying his own expenses and costs. He could select whatever equipment he wished to sell so long as it equaled or bettered technical specifications that Verizon established. He controlled his work hours and his business practices, and provided his own place of business. He was responsible for carrying his own insurance. Essentially, he was free to run

his business as he saw fit, except that he could not sell the services of any of Verizon's competitors. But for a few reasonable requirements and some training, his daily routine was free from Verizon's interference or direction.

The circumstances surrounding the debtor's residual payments from Verizon are similar to those surrounding insurance renewal commissions that the debtor was entitled to receive in *In re Braddy*, 226 B.R. 479 (Bankr. N.D. Fla. 1998). In that case, the debtor had given up his insurance license and retired from the business, but continued to receive renewal commissions to the extent his clients renewed their insurance. 226 B.R. at 480. Rejecting the debtor's arguments, the court held the renewal commissions were property of the estate and could not be exempted under Florida's wage garnishment exemption statute. 226 B.R. at 480-83.

The debtor contends that *Price*, 195 B.R. 775, supports his exemption claim. Debtor Price was a real estate agent who had secured two sales contracts before she filed for bankruptcy for which the closings occurred after she filed. *Id.* at 776. The Court finds the circumstances in that case to be distinguishable from those in this case on several grounds: (1) debtor Price was not allowed to hire any real estate broker or salesperson to work for her; (2) Price's license required her to work exclusively under one real estate broker, and she agreed to act as a real estate agent subject to the supervision and control of the licensed broker and company she worked with; and (3) the real estate company made available to Price an office or desk space and reception area, along with access to listings, forms, advertising, and telephone and other communications means. Under those circumstances, Judge Robinson concluded that the real estate company and its broker exercised sufficient control over Price to make her an employee who could exempt part of the commissions pursuant to K.S.A. 2001 Supp.

60-2310. *Id.* at 777-79. Under their Contract, Verizon exercised very little control over the debtor in this case.

For these reasons, the Court concludes that the postpetition residual payments are property of the bankruptcy estate and that the debtor is not entitled to exempt any portion of them under K.S.A. 2001 Supp. 60-2310.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of May, 2002.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE